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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-743

LOCTITE CORPORATION, *Petitioner,*

v.

BROADVIEW CHEMICAL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK

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Petitioner, Loctite Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in its cause numbered 71-1441 entered on September 16, 1971. That judgment affirmed an order of the district court challenged on the basis that the district court lacked jurisdiction over the subject matter of the action.

OPINIONS BELOW

The Judgment of the United States Court of Appeals is unreported and consists of a mere form in which affirmance is indicated by typing. No opinion was rendered. It is printed in the appendix to this petition commencing at page 1a. The order affirmed is dated March 24, 1971, and is printed at 2a to 4a.

JURISDICTION

The Judgment of the Court of Appeals from which the present appeal is taken is dated September 16, 1971. Timely petitions for rehearing and rehearing en banc were denied on October 13, 1971. (15a to 16a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was there a denial of due process of law to petitioner-defendant in this declaratory judgment action, where petitioners, claiming lack of jurisdiction because no actual controversy exists between the parties, was denied a hearing, oral or otherwise, on that issue and further denied the right to discovery in preparation for such hearing?

2. Was the lower court judgment in conflict with *Golden* v. *Zwickler*, 394 U.S. 103 (1969) in denying petitioner a hearing on the existence of an actual controversy at the time of the hearing?

It is submitted that these questions are clearly answered in the affirmative.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is Amendment 5, which reads in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The statutory provision involved is 28 United States Code §§ 2201 and 2202, as follows:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> § 2202. Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

STATEMENT OF THE CASE

1. The Immediate Facts.

The present petition is the culmination of a series of declaratory judgment actions brought by respondent, Broadview Chemical Corporation, against petitioner, Loctite Corporation. The first such action was instituted by Broadview on June 1, 1964, seeking an order

declaring that several of Loctite's patents were invalid and noninfringed by certain Broadview compositions that function as anaerobic sealants.[1]

To immediately focus on the facts necessary to a determination of this petition, on May 11, 1970 respondent, unsatiated by six years of litigation, filed a so-called amended complaint (4a to 8a), which Loctite moved to dismiss for lack of an actual controversy as to the compositions identified therein by the designation, Manaka. The District Court denied that motion in a Ruling on Defendant's Motion to Dismiss Amended Complaint (11a to 13a), although it did rule that "[t]echnically, therefore, the new complaint must be considered supplemental rather than amendatory". (11a) The only averment in the "amended" complaint in support of an actual controversy was a letter of February 17, 1967. (9a) Broadview then changed its Manaka compositions but, on November 13, 1970, an Order of the District Court held that those Manaka II compositions could be substituted for the Manaka I compositions and so, on that date, the Manaka II compositions officially entered the case.

Loctite attempted to show that, on November 23, 1970 and thereafter, no actual controversy existed between the parties, any threat contained in the letter of February 17, 1967 having long since been dissipated. Loctite sought to do so by noticing the deposition of several Broadview customers, exemplary of which is the notice of taking deposition of Fred Jenkins on

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[1] Anaerobic sealants are compositions in liquid form which, when deprived of oxygen, polymerize or harden. An understanding of the precise mechanism by which they function is not necessary to the issues on this petition.

January 12, 1971 (13a), to show that, whatever the effect of the letter of February 17, 1967, there was no threat in the minds of Broadview's customers on November 13, 1970, or the subsequent hearing at which Loctite would present evidence of lack of controversy. In an oral decision rendered January 25, 1971 (14a), the District Court effectively struck the notices of taking depositions by granting Broadview's motion for a protective order and denying Loctite the right to take discovery of Broadview's customers and prospective customers, i.e., those who possibly could have obtained the letter of February 17, 1967. The District Court thus effectively barred Loctite from any hearing, either oral or on papers, by preventing Loctite from obtaining evidence to present at the hearing. The litigation had now become open-ended, i.e., the existence of an actual controversy was presumptively proved by the letter of February 17, 1967, and Loctite could not present evidence at any hearing to show that the effect of the letter had been dissipated.

Subsequently Loctite, by appeal brief filed on or about July 1, 1971, disavowed the letter of February 17, 1967. The Court of Appeals, however, affirmed the Order from which appeal was taken without opinion, thus condemning Loctite to perpetual litigation, since the effect was to render any disavowal of the letter nugatory and permanently prevent Loctite from obtaining a hearing at which it could show that the 1967 letter was of no force and effect due to the passage of time. A petition for rehearing and rehearing en banc on the basis that the Court of Appeals overlooked *Golden v. Zwickler,* 394 U.S. 103 (1969), which is directly in point, was denied by the Court of Appeals (15a to 16a), again without comment.

2. Background of the Petition.

The first declaratory judgment action brought by respondent terminated in a consent judgment entered February 15, 1967 in which Broadview acknowledged that Loctite's patents were valid and had been infringed by it. Subsequently, Broadview was found in contempt of Court for its manufacture and sale of still other anaerobic sealants, which decision was finalized by a decision of the Court of Appeals for the Second Circuit entitled *Broadview Chemical Corporation* v. *Loctite Corporation*, 406 F.2d 538 (2d Cir. 1969); cert. denied 394 U.S. 967 (1969). A Decision on Form of Injunction (18a to 20a) issued on May 10, 1969, and the controversy between Broadview and Loctite should have been at an end.

On April 24, 1969, however, Broadview had instituted still another declaratory judgment action asking the District Court to adjudge that two of Loctite's patents were not infringed by Broadview's manufacture, use and sale of still another line of anaerobic sealants, 86 in number, which Broadview identified by the letters KBK. To that complaint, identified in the District Court as Civil Action No. 13,104, and annexed as its sole basis for meeting the "actual controversy" requirement of 28 U.S.C. §§ 2201, 2202, the Declaratory Judgment Act, was the letter dated February 17, 1967, from Robert H. Krieble, president of Loctite, to Loctite distributors (9a to 10a). After the District Court dismissed the declaratory judgment complaint in a ruling unofficially reported at 162 U.S.P.Q. 366 (D.Conn. 1969), the Court of Appeals reversed at 417 F.2d 998 (2d Cir. 1969) and this Court denied certiorari at 397 U.S. 1064 (1970).

On remand the District Court was faced not with the complaint of April 24, 1969, but with the "amend-

ed" complaint for the first time directed to Manaka compositions. Again Loctite moved to dismiss, but in a Ruling on Defendant's Motion to Dismiss Amended Complaint (11a to 13a) the district judge said, "Loctite offered no evidence that the passage of time had any effect on the existence of a controversy . . ." Yet when Loctite noticed depositions and sought a hearing to show such effect, it was denied that right, preserving the 1967 letter *in perpetuum* as a basis for meeting the "actual controversy" requirement of the Declaratory Judgment Act.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is in Direct Conflict With the Decision of This Court in Golden v. Zwickler and With the Court of Appeals for the Ninth Circuit That Has Followed Golden v. Zwickler.

Since the Court of Appeals effectively denied Loctite the right to a hearing at which Loctite could contest the presence of an actual controversy necessary to sustain declaratory judgment jurisdiction, the only theory under which it could possibly have been acting was that Loctite had already had its day in court in 1969 when it contested the original action as to the KBK compositions and the Manaka compositions of the "amended" complaint were not yet in existence. This presumption is based on the belief that the Court of Appeals would not dogmatically deny Loctite a hearing however incorrect it believed Loctite's position to be. If such was the reasoning of the lower court in denying petitioner a hearing, it is in direct conflict with the rule of this Court as stated in *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969):

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the

> elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on the remand. We now undertake that inquiry."

Not only did the Second Circuit fail to follow this Court's decision in *Golden* v. *Zwickler*, but it rendered a decision in conflict with the Court of Appeals for the Ninth Circuit, which perforce followed *Golden* v. *Zwickler*. That Court, in *Sellers* v. *Regents of University of California*, 432 F.2d 492 (9th Cir. 1970), stated at page 499:

> "The 'controversy' must exist at the time of the hearing as to the availability of declaratory relief and that determination is entirely independent of any controversy that may have existed in the past."

There is no question but that petitioner was entitled to a determination of whether the controversy requisite to the relief under the Declaratory Judgment Act existed and that the time for such determination was at the time of the hearing, not several years before.

2. The Decision of the Court of Appeals Is Directly Violative of Loctite's Right to Due Process of Law.

If the Court of Appeals was not in disregard of *Golden* v. *Zwickler* but merely refused Loctite a hearing, on oral argument or submission of papers, with respect to Loctite's contention that there was no actual controversy, such refusal would be so contrary to the inchoate principles of English and American jurisprudence as to warrant exercise of the power of supervision of the Supreme Court. In a recent state-

ment of this Court in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), at page 267, this Court said:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965)."

In a more historical setting, Daniel Webster's argument in *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518, 581 (1819), defined due process as "a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

In 1873 in *Galpin* v. *Page;* 18 Wall. 350, 368, this Court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

That one may not be deprived of his right to liberty or property without due process of law was iterated as recently as *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). It is inconceivable that the Second Circuit would have utilized the absence of a written opinion to deny petitioner its basic right to contest the existence of an actual controversy as it was once again hauled into court on the tumbrel of the Declaratory

Judgment Act. Yet that is precisely what has happened, and the journey can apparently be repeated *ad nauseum* since Loctite, according to the Second Circuit, can never revoke and never challenge the letter of February 17, 1967, which stands as a perpetual monument to unending litigation. Petitioner's right to due process has been negated, for the past and the future, without a word of explanation or condolence.

CONCLUSION

Because of the failure of the Second Circuit to accord petitioner due process or to follow *Golden* v. *Zwickler,* the case should be remanded with instructions that the district court hold a hearing in accordance with *Golden* v. *Zwickler,* at which hearing the existence of an actual controversy will be determined. Petitioner also prays for a stay of further proceedings in this action until a hearing has been held and determined, since a stay pending the filing of this petition was denied by the Court of Appeals. (16a)

Respectfully submitted,

WALTER D. AMES
JAMES H. MARSH, JR.
Attorneys for Petitioner,
Loctite Corporation
WATSON, COLE, GRINDLE & WATSON
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Of Counsel:

J. RODNEY RECK